# 78-1394

No. ....-.....

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1978

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION,
*Petitioner,*

v.

AIR TRANSPORT ASSOCIATION OF AMERICA,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Professional Air Traffic Controllers Organization ("PATCO"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINION BELOW

The oral opinion of the court below is, by statement of the court, "not to be reported." It is set out in the Appendix hereto. (Appendix A, 11.)

The opinion of the District Court is reported officially at 453 F.Supp. 1287 (E.D.N.Y. 1978). It is reported unofficially at 98 L.R.R.M. 2985. It is set out in the Appendix. (Appendix B, 14.)

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. This judgment of the Second Circuit was entered on December 13, 1978.

## QUESTIONS PRESENTED

1. Whether the Norris-LaGuardia Act applies to a suit by a private party against federal employees and their union?

2. Whether a federal employee union may be held in contempt of an injunction which is so broad and vague that it violates the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*?

3. Whether in 1978 a party may be held in contempt of injunctions which were issued in 1970 and 1972, and which arose out of an entirely different dispute and which relate to a separate and distinct controversy?

## STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set out in Appendix C.

## STATEMENT OF THE CASE

PATCO is a labor organization which represents air traffic controllers employed by the Federal Aviation Administration (FAA). At all material times, FAA and PATCO have been parties to a collective bargaining agreement providing for terms and conditions of employment, including the provision for in-flight training opportunities for PATCO members on domestic and overseas flights.

Respondent Air Transport Association of America (ATA) is an association of commercial airlines. ATA has no "employment" relationship with PATCO's members.



ATA does not bargain with PATCO under federal labor laws.

In the spring, 1978, PATCO complained that certain ATA member air carriers were refusing to honor requests for flights for controllers, thus stultifying the purpose of the training program and the agreement reached by their Employer with PATCO. Thereafter, some flights of several air carriers were delayed, allegedly as a result of work slowdowns by PATCO members at various air traffic control facilities in New York and Washington, D.C.

On May 26, 1978, ATA obtained an Order to Show Cause in the federal district court for the Eastern District of New York against PATCO, as to why it should not be adjudicated in civil contempt of two judgments entered against PATCO in 1970 and 1972. The basis of the 1970 judgment is set forth in *A.T.A.* v. *P.A.T.C.O.*, 313 F.Supp. 181 (E.D.N.Y. 1970).

The facts which gave rise to the injunctions issued in the 1970 case are markedly different than those in 1978 which resulted in the instant litigation. In 1970, the dispute was between FAA, as the employer, and the controllers. It related to terms and conditions of employment with the FAA. It was the failure to expedite resolution of existing problems between FAA and controllers, the failure of FAA to hire additional staff to relieve overburdened controllers, and similar matters, which gave rise to the job actions by PATCO and its members in 1970. Then, the FAA was the source of the wrongs to the controllers. In 1978, PATCO had no dispute with FAA. Its dispute was solely with ATA and its air carrier members.

PATCO moved to vacate the Order to Show Cause and to dismiss ATA's application for contempt, on the ground that the 1970 final judgment did not apply to or restrain the alleged conduct in 1978. The parties thereafter entered into a stipulation which *inter alia* provided as follows:

> "4. PATCO denied that it encouraged or engaged in any slowdowns on any of the aforesaid dates, denies that the aforesaid injunctions [1970 orders] were valid

or effective on said dates, and has filed a motion seeking to vacate the said order to show cause of May 26, 1978 on the ground that the said injunctions were not valid and effective on said dates."

* * *

"7. PATCO asserts, and by this stipulation retains its right to assert, that the aforementioned injunction against PATCO was not valid and effective as against PATCO on May 25 and 26, 1978 and on June 6 and 7, 1978."

On the basis of the stipulation, the District Court proceeded to determine the cause, as set out in Appendix B, and entered an order adjudicating PATCO in contempt of the 1970 and 1972 injunctions and fining PATCO $100,000 therefor. The Court of Appeals affirmed.

## REASONS FOR GRANTING THE WRIT

### I. This case presents questions of the utmost importance to federal employees concerning the application of the Norris-LaGuardia Act in suits brought by private parties against job actions of public employees.

This Court held in *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), that the Norris-LaGuardia Act was not applicable to strikes by federal employees in a suit prosecuted by the United States. There is no case law on whether the Act is similarly inapplicable in a suit prosecuted by a private party against a strike or other kind of job action by federal employees or their union. The instant case offers this Court the opportunity to establish what the law in such situations shall be.

Strikes and other types of job actions by federal employees are becoming common place. And with increasing frequency, the federal government has determined that injunctive proceedings are not in its best interests and has not initiated any legal proceedings. This has left private third parties, who believe their interests have been injured, as the moving party against such strikes.



Such was precisely the situation herein. Indeed, the District Court stated in frustration, "for reasons not fathomable by this Court [the Attorney General has] yet to initiate any investigation or enforcement proceedings." (App. B, 25.) And, it remained for ATA to press for enforcement of the 1970 and 1972 injunctions and to seek contempt citations.

Without a clear decision from this Court on the application of Norris-LaGuardia, the lower federal courts are free to allow private parties to file injunctive proceedings and contempt actions against public employee unions without having to meet the strict standards fixed by Congress on judicial intervention in labor disputes.[1] Federal employees will thus find themselves in precisely the same disadvantage that private sector employees were in prior to Norris-LaGuardia.

The instant case, in all likelihood, could not have arisen in the private sector where the Norris-LaGuardia Act controls. Section 9 of the Norris-LaGuardia Act provides:

"No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and

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[1] The Court below was obviously swayed by this void in the law when it stated:

"As the Supreme Court made clear in *United Mine Workers*, the Norris-LaGuardia Act has no application, at least in a suit by the Government, to illegal strikes or slowdowns by Government employees. Aside from this, it is a crime for a Government employee to engage in a strike against his employer, 18 U.S.C. § 1918. An injunction in such a context does not threaten any control of labor policy, as might occur in private employment relationships. (App. A, 13).

> as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter."

Because an injunction "shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint," the 1970 injunction would have no applicability to the acts complained of in the Order to Show Cause in 1978.

It follows that PATCO could not be guilty in 1978 of contempt of orders so broad and vague as to violate § 9, and could not run afoul of judicial decrees which were written at another time, to cover a different dispute, and for entirely different purposes.

The clearest evidence that review by this Court is necessary is afforded by the treatment of the Court below of one of its own decisions in the private sector. In *New York Telephone Co.* v. *Communications Workers of America,* 445 F.2d 39 (1971), the Court below by a different panel had held that it was impermissible, in the light of § 9 of Norris-LaGuardia, to hold a private sector union in contempt of an injunction which originally arose out of a dispute different than the one presently before the court. PATCO relied heavily on *Communications Workers* in both the district and appellate courts. The Court below rejected reliance upon *Communications Workers* because it believed that the injunctive order therein "was not intended to apply to a later strike arising out of a different dispute." (App. A, 13.) Left unstated by the Court below, is that the holding in *Communications Workers* was the product of a stringent application of the principles of § 9 of Norris-LaGuardia. PATCO submits that the Court below would have reached a different result herein, if it had been obliged to apply Norris-LaGuardia as it did in *Communications Workers.*

## II. The decision of the Court below conflicts with decisions of this Court, with decisions of the same circuit and with decisions of other Courts of Appeals.

A. This Court held in *Terminal Railroad Association of St. Louis* v. *U.S.,* 266 U.S. 17, 29 (1924), that:



> "In contempt proceedings . . . a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issue and the purpose for which the suit was brought . . ."

The decision below is in direct contradiction of this proscription. The 1970 case was meant to put an end to future PATCO job actions directed at altering FAA rules, staffing standards, and government working conditions. The "permanent" injunctive language can only be read (1) in the context and in reference to the 1970 dispute; and (2) temporally beyond a preliminary restraint.[2] There is nothing in the record, and the Court below cites no evidence to support its legal conclusions to this effect, that justifies the notion the 1978 controversy between ATA and PATCO on in-flight training opportunities was intended by the parties to be covered by the 1970 and 1972 decrees. But, unless such evidence exists, and unless the Court below limits its construction of those decrees "to the issues and purposes for which the suit was brought," the lessons of *Terminal Railroad* are for naught.

ATA and the Court below find support in *U.S.* v. *Armour & Co.,* 402 U.S. 673 (1971), for applying the old decrees to the current controversy. Actually, however, that case reinforces the teachings of *Terminal Railroad.* For in *Armour & Co.,* this Court analyzed the original issues involved, the original purposes for the suit and decree, and on that analysis *refused to expand the old decree to bar* the newly complained-of actions. If the Court below had properly read and applied *Armour & Co.,* PATCO would not have been fined $100,000.

B. To limit injunctive language and decrees to the specific circumstances of the controversy out of which the dispute originally arises, is not a new concept. Other Courts of Appeals, following the lead of *Terminal Railroad* and Rule

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[2] The second "permanent" injunctive order, which ran against the individual defendants, was not entered until 1972. It is difficult to view periods of two years or more as "preliminary."

65(d) of the Federal Rules of Civil Procedure, restrict the scope of the restraint to the specifics of the original cause. See *Denver-Greeley Valley Water Users Association* v. *McNeil*, 131 F.2d 67 (10th Cir. 1942); *Russell C. House Transfer & Storage Co.* v. *U.S.*, 189 F.2d 349 (5th Cir. 1951).[3]

The Court below ignored these other appellate decisions, and went its own way alone.[4]

C. The decision below is in direct conflict with the decision of another panel of the same court in *New York Telephone Co.* v. *Communications Workers of America*, 445 F.2d 39 (1971). If that case had been followed herein, PATCO would not have been fined $100,000.[5]

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[3] In the latter case, the Fifth Circuit said:

> "Basic in the law is the principle that no decree should be so broad as to place the entire conduct of one's business under the jeopardy of punishment for contempt for violating a general injunction. Whenever a carrier has been adjudged to have violated the provisions of the Interstate Commerce Act in a particular manner, the court may perpetually enjoin the carrier from further violations of the Act by the means employed. But the court should not enjoin the carrier in general terms not to violate the Act in any particular and thus subject the carrier to contempt proceedings if it should at any time in the future commit some *new violations, unlike and unrelated to that with which it was originally charged.* Swift & Company v. United States, 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed. 518; New York, New Haven & H.R. Co. v. Interstate Commerce Commission, 200 U.S. 361, 26 S.Ct. 272, 50 L.Ed. 515; N.L.R.B. v. Express Publishing Company, 312 U.S. 426, 61 S.Ct. 693, 85 L.Ed. 930; Nasif v. United States, 5 Cir. 165 F.2d 119. Yet, this is precisely what the court did in the case at bar." 189 F.2d at 351 (Emphasis added.)

See also *Payne* v. *Traverrol Laboratories, Inc.*, 565 F.2d 895 (5th Cir. 1978), and the cases therein cited; *Schine Chain Theatre* v. *U.S.*, 334 U.S. 110 (1948).

[4] Neither the Court below nor ATA has cited any other case wherein an old decree is used for a contempt citation on new conduct.

[5] Judge Mansfield, who filed a "concurring and dissenting" opinion in *Communications Workers*, sat as the Chief Judge in the instant case and delivered the oral opinion of the Court set out in Appendix A.



ATA, the District Court, and the Court below, have sought to distinguish *Communications Workers* on a number of grounds. The first ground is the alleged distinction that the employer's original application in *Communications Workers* was limited to a specific dispute, while the instant case is dependent on federal law making *all* strikes by government employees illegal. "Obey the law" injunctions must be limited as well; and even if that were not the case, the *acts*, as well as the facts in original litigation were entirely different in 1970 and 1978.

The second purported distinction was the absence of a "quid pro quo" in *Communications Workers*. In the instant case, both Courts below accepted the argument that as a result of the 1970 consent decree there were arguably collateral benefits running to PATCO from its reinstatement as the representative of the controllers.

But this collateral benefit, if such it was, did not come to it from ATA; it could not have been a consideration flowing from ATA. The consideration from ATA, if indeed there was any, would be the same as in *Communications Workers*, and this was determined to be not enough.

Judge Lumbard wrote that the company's suggestion of what constituted the *quid pro quo* was "an odd bargain indeed." 445 F.2d at 48. Just as odd is the bargain proposed herein. Here, too, ATA "would have us believe that the [union] gave up more than [ATA] could have secured via [final decision from the Court], and certainly far more than [ATA] was entitled to under the allegations of its complaint."[6] *Id.* No one has ever offered "a satisfactory

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[6] There is no way, in 1970 or 1972, ATA could have secured a court decision barring PATCO from engaging in job actions in 1978. Even if ATA in 1970 or 1972 had "established [its] factual claims and legal theories," *U.S.* v. *Armour & Co.*, 402 U.S. at 682, PATCO's 1978 conduct would have remained untouched.

explanation as to why [PATCO] would consent to forfeit all opportunities for concerted activity upon threat of summary contempt." *Id.* at .... ATA's argument herein "presupposes utter irrationality on [PATCO's] behalf."[7] *Ibid.*

[7] ATA and both Courts below have made the point that a strike by federal employees is illegal and, therefore, PATCO had nothing to lose by consenting to a permanent injunction. The fault in this logic is that although the statute making federal-employee strikes illegal, 18 U.S.C.A. § 1918, has been on the books for 23 years, *it has never been invoked.* The Department of Justice has taken the position that attempts to impose criminal penalties may be less than satisfactory, when introduced into a labor dispute situation. See Appendix D. PATCO and other federal-employee unions are well aware of these facts. PATCO thus knew that there was little risk of criminal action against it. It did, in fact, have much to lose by agreeing to forego "permanently" any concerted action. When the Court below stated that the injunction against PATCO "does not threaten any control of labor policy," App. A, 13, it is not only usurping Congress' role, it is also enunciating a policy in direct conflict with the view of the Department of Justice. Judicial interposition, such as this by the Court of Appeals, is precisely what the Norris-LaGuardia Act was designed to eliminate.

## CONCLUSION

For the reasons set forth herein, this Petition should be granted.

Respectfully submitted,

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## APPENDIX A

(The following statement does not constitute a formal opinion of the Court and is not to be reported. It shall not be cited or otherwise used in unrelated cases.)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AIR TRANSPORT ASSOCIATION OF AMERICA, AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INC, MOHAWK AIRLINES, INC., CONTINENTAL AIRLINES, INC., et al.,

*Plaintiffs-Appelles,*

—against—

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION ("PATCO"), MICHAEL J. ROCK, individually and as Chairman of the Board of Directors of PATCO, et al., Dkt. No. 78-7419

*Defendants,*

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION ("PATCO"),

*Defendant-Appellant.*

PRESENT:

Honorable Walter R. Mansfield, James L. Oakes, *Circuit Judges,* and Milton Pollack, *District Judge.*

December 13, 1978

## STATEMENT OF THE COURT

MANSFIELD, *Circuit Judge:*

The Professional Air Traffic Controllers Organization—PATCO—appeals from an order and judgment of civil contempt entered in the Eastern District of New York on August 1, 1978, by Judge Thomas C. Platt, to the effect that

on four dates in May and June 1978 it violated a permanent injunction entered on September 9, 1970, which, among other things, prohibited PATCO from inducing, authorizing, calling, encouraging or engaging in any work stoppage or slowdown on the part of air traffic controllers employed by the United States. The sole issue raised in this case, both in the district court and here, is whether the 1970 injunction was valid and effective in May and June 1978. Judge Platt concluded that it was. We agree and affirm.

The September 9, 1970, permanent injunction grew out of a massive work stoppage and so-called sick-out by air traffic controllers employed by the Federal Aviation Administration, leading to a suit in the Eastern District of New York by the Air Transport Association of America—ATA—and 13 airlines against PATCO, PATCO officials and some 200 air traffic controllers, charging violation of Title 5 U.S.C. § 7311, which prohibits strikes by U.S. employees, and seeking injunctive relief and damages.

The late Judge Judd, finding that the Norris-LaGuardia Act did not apply to strikes by U.S. Government employees and that the slowdown violated § 7311, granted preliminary injunctive relief, which we modified on appeal by striking a provision that the Federal Aviation Administration refrain from imposing administrative sanctions. 438 F.2d 79, *cert. denied*, 402 U.S. 915. Faced with a $50 million damage suit and contempt proceedings, the defendants in that action entered into a stipulation consenting to a broad *permanent* injunction, subject to certain conditions not pertinent here, which was duly entered on September 9, 1970, and is the basis of the present action.

There is evidence that in May and June 1978 PATCO threatened and various air traffic controllers engaged in, a slowdown directed toward coercing Pan Am and TWA to satisfy the controllers' demands for free overseas air travel under a PATCO-FAA agreement. Civil contempt proceedings were instituted by appellees charging violation of the 1970 decree. The parties stipulated that the issue to be



resolved by the court was whether the 1970 permanent injunction applied to the 1978 slowdown.

The literal language of the 1970 decree prohibits the 1978 slowdown. However, appellants argue in effect that the 1970 decree should be construed as prohibiting any *continuation* of the 1970 activities. We disagree.

The parties to the 1970 decree clearly intended it to apply permanently. This is evidenced by the very description of the injunction—a "permanent injunction"—and by the decree's broad language, in return for which the ATA and plaintiffs were giving up their right to pursue their action for $50 million damages and an adjudication of contempt, which, if successfully pursued, could have had serious and far-reaching consequences for PATCO and the controllers. The Supreme Court's decision in *U.S.* v. *Armour & Co.*, 402 U.S. 673, controls.

As the Supreme Court made clear in *United Mine Workers*, the Norris-LaGuardia Act has no application, at least in a suit by the Government, to illegal strikes or slowdowns by Government employees. Aside from this, it is a crime for a Government employee to engage in a strike against his employer, 18 U.S.C. § 1918. An injunction in such a context does not threaten any control of labor policy, as might occur in private employment relationships.

Nor does our decision in *N.Y. Telephone Co.* v. *Communication Workers of America*, 445 F.2d 39 (1971), apply. There we concluded that a *temporary restraining order*, drafted by the employer and intended to apply to a particular work stoppage, was not intended to apply to a later strike arising out of a different dispute.

Here we are dealing with a *permanent injunction* drafted by PATCO and consented to by it with the advice and assistance of competent counsel. The parties clearly agreed to override any policy that might be expressed in § 9 of the Norris-LaGuardia Act.

Accordingly, we hold that the September 9, 1970, *permanent* injunction means just what it says—that it is permanent—and applies to the slowdowns conducted by appellants in May and June, 1978. The judgment of the district court is therefore affirmed.

## APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AIR TRANSPORT ASSOCIATION OF AMERICA, et al.,

*Plaintiffs,*

—against—

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION ("PATCO"), et al.,

*Defendants.*

70 Civ. 400
MEMORANDUM AND ORDER
July 17, 1978

PLATT, D.J.

By an order to show cause with an affidavit annexed, dated May 26, 1978, and by subsequent notice of motion seeking to amend their original motion, and a stipulation dated June 22, 1978, which was so ordered by this Court on June 23, 1978, plaintiffs have moved for an adjudication that the defendant, Professional Air Traffic Controllers Organization ("PATCO"), be held in civil contempt of Court for violating and disobeying the final judgment of this Court filed on September 9, 1970, by virtue of alleged slowdowns by air traffic controllers, on May 25 and 26, 1978, and June 6 and 7, 1978, and for an order requiring PATCO, in accordance with the aforesaid judgment of September 9, 1970, to pay to the plaintiffs the sum of $25,000 for each day, or part thereof, during which such violations have occurred.

Defendant PATCO has itself made a motion to vacate plaintiffs' order to show cause and to dismiss plaintiffs'



application on the grounds that this Court's final judgments of September 9, 1970 and October 20, 1972 "do not apply to or restrain the conduct alleged against defendant PATCO which is extant".

Prior to the hearing of the above motions, as indicated above, the parties entered into a Stipulation Re Motion for Contempt on June 22, 1978, which this Court so ordered on June 23, 1978, which provides in pertinent part as follows:

> "The plaintiffs' aforesaid motions for an adjudication in contempt are by this stipulation amended to claim the following violations: violations by PATCO of the aforesaid injunction of September 9, 1970 by virtue of slowdowns on May 25 and 26 and on June 6 and 7, 1978.
>
> "PATCO asserts, and by this stipulation retains its right to assert, that the aforementioned injunction against PATCO was not valid and effective as against PATCO on May 25 and 26, 1978 and on June 6 and 7, 1978.
>
> "If it be determined by this Court that the aforesaid injunction against PATCO was valid and effective on the aforesaid dates, it is agreed that for purposes of this motion only, and without prejudice to PATCO's reserved rights under paragraph 7, PATCO shall be deemed to have disobeyed the prohibitions of said injunction with respect to slowdowns by air traffic controllers on May 25 and 26, 1978 and June 6 and 7, 1978.
>
> "Upon an adjudication that the said injunction was valid and effective against PATCO on May 25 and 26, 1978 and on June 6 and 7, 1978, and that PATCO is, by agreement of the parties, deemed to have disobeyed the said injunction with respect to slowdowns on said dates, as provided by paragraph 8, the Court shall enter judgment requiring PATCO to pay the Air Transport Association of America the sum of One Hundred Thousand ($100,000) Dollars (that is, Twenty-Five Thousand ($25,000) Dollars with respect to each of the aforesaid four days, as provided in the aforesaid judgment of September 9, 1970), the plaintiffs waiving, as against the defendants and defendant PATCO's officers, directors, members and constituent bodies, any other claim for damages, costs or attorneys' fees in addition

to said stipulated sum for any slowdowns occurring to and including June 20, 1978."

Thus, this stipulation in essence provides that (i) plaintiffs' motion be deemed amended to seek contempt adjudications from this Court only as to May 25 and 26, 1978, and June 6 and 7, 1978, and (ii) defendant PATCO concedes, for the purposes of plaintiffs' contempt motion only, that if this Court shall decide that its prior aforementioned orders do "apply to or restrain the conduct alleged against defendant PATCO", PATCO shall be deemed to have disobeyed the September 9, 1970 order on those dates and shall pay plaintiff $100,000 in accordance with the terms of that order.

The effect of this stipulation then is to leave for this Court to decide only the question whether its prior orders do presently "apply to or restrain the conduct alleged against defendant PATCO."

In resolving this question, it is necessary first to examine the history of this action.

In the words of my late and highly esteemed colleague Judge Orrin G. Judd, in *Air Transport Association* v. *Professional Air Traffic Controllers Organization,* 313 F.Supp. 181, 183 (E.D.N.Y.), *vacated in part* 438 F.2d 79 (2d Cir. 1970), *cert. denied,* 402 U.S. 915 (1971), the original complaint in this proceeding

> "charges an illegal conspiracy to violate the United States statute which forbids anyone to hold a position with the United States government while he participates in a strike or asserts the right to strike or is a member of an organization of employees that he knows asserts the right to strike against the government. 18 U.S.C. § 1918. . . ."[1]

[1] Section 1918 of 18 U.S.C. provides in pertinent part that:

> "Whoever violates provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—
>
> • • •
>
> (3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia;
>
> • • •
>
> shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both."

Section 7311 of 5 U.S.C. (which, in paragraph (3), repeats the language of paragraph (3) above), is the civil counterpart of section 1918. In accordance with this latter statutory prohibition, all federal employees are required to take an oath, on assuming their positions, which among other things, forswears participation in a strike. *See* 5 U.S.C. § 3333.



> "The complaint alleges that an illegal work stoppage has occurred by concerted action of the defendants [PATCO and individual air traffic controllers], based on false assertions of illness, that this is a strike, and that it has caused serious financial damage to the airline plaintiffs and interferes with their normal operations."

On the date of the complaint, March 30, 1970, Judge Judd signed an order to show cause, bringing on a motion for preliminary injunction, with a temporary restraining order which provided that until April 9, 1970, defendants be restrained, *inter alia,* "from . . . conducting, continuing or engaging in any strike or other concerted failure by Air Traffic Controllers employed by the Federal Aviation Agency . . . to report for work or perform work, by concerted 'sick call' or otherwise, or in any concerted slowdown in the performance of their work."

The defendants having refused to obey such restraining order, plaintiffs on April 6, 1970, moved by further order to show cause to hold defendants in contempt on Judge Judd's restraining order.

On April 9, 1970, Judge Judd continued the temporary restraining order for an additional ten days, changing the language of the prohibition clause to read, in pertinent part, that defendants were restrained from:

> ". . . in any manner continuing, encouraging, ordering, engaging, obstructing, aiding or taking part in

> work stoppage or slowdown or any interference with or obstruction with the movement or operation of any aircraft and air commerce or air transportation at any traffic facility operated by the Federal Aviation Administration, or interference with or obstruction to the application of the safety standards and procedures established by the FAA for the regulation and control of air traffic in the United States of America."

This language was carried forward without material change into an order of temporary injunction entered April 13, 1970, which was extended by order dated April 20, 1970, and in an order of preliminary injunction entered after a hearing on May 5, 1970.

On or before April 14, 1970, defendants' "assertions of illness" had come to an end, leaving for determination by this Court plaintiffs' application for a permanent injunction and plaintiffs' claims for damages arising from defendants' alleged violation of the law and from defendants' alleged breach of the Court's injunction order.[2]

Negotiations ensued between the parties in which they sought to resolve their differences and to settle the lawsuit. On August 24, 1970, counsel for PATCO submitted a written settlement proposal pursuant to which "PATCO, its officers and members would consent to a permanent injunction" which, among other things,

> "would restrict, prohibit and enjoin PATCO, all members of the Professional Air Traffic Controllers Organization, their officers, agents, and employees, from acting in concert or participating in, calling, causing, authorizing, inducing, etc. any strike or other concerted failure of air traffic controllers employed by the Federal Aviation Agency *to perform, to work,* or report for work *in any concerted slowdown* in the performance of their work." (Emphasis added.)

It is significant to note first that the 1970 dispute involved "false assertions of illness" and second that the above draft

[2] Plaintiffs have alleged such damages exceeded $50,000,000.



was prepared by the attorneys for PATCO, not the attorneys for the plaintiffs.

Further discussions followed and on September 9, 1970, the parties entered into a stipulation of settlement which provided, in pertinent part, for plaintiffs' waiver of its damage claims against defendants and for a final judgment of permanent injunction which prescribed that:

> "PATCO, its officers, agents, employees and members, its successors or assigns, and any other person acting in concert with it or them, is permanently prohibited and enjoined from, in any manner, calling, causing, authorizing, encouraging, inducing, continuing or engaging in any strike (including any concerted stoppage, slowdown, or refusal to report to work) by air traffic controllers employed by an agency of the United States, or any other concerted, unlawful interference with or obstruction to the movement or operation of aircraft or the orderly operation of any air traffic control facilities by any agency of the United States."

and that

> "in the event the defendant PATCO shall itself engage or participate in any action which violates the terms of paragraph '1' of this judgment, PATCO shall be required to pay to the plaintiff Air Transport Association of America, Inc., or to its assignee or assignees, the sum of twenty-five thousands dollars ($25,000) for each day, or part thereof, during which such violation by said defendant continues, said obligation to be in addition to and without prejudice to any other rights which plaintiffs or any of them, may have in respect of such violation, provided, however, that any payment by PATCO pursuant to the terms hereof shall be credited against any other sums payable by PATCO on account of such violations to said plaintiff or to any other plaintiff herein, the manner in which said credit to be applied to be determined by the Court as the equities shall then appear."

Under the stipulated settlement PATCO was immediately "permanently" enjoined, as indicated above, but the individual defendants named in the proceeding (i.e., the air traffic controllers themselves) were given an opportunity

during the ensuing two years, either to secure a judicial determination with respect to the constitutionality of the statutory prohibition against strikes by government employees or to deny and litigate their personal involvement in the alleged violations.[3] Moreover, with respect to PATCO, the stipulation specifically provided it would have the right to apply to the Court to vacate or revise the final judgment "in the event the Congress of the United States shall enact legislation making it lawful for employees of the United States to strike, or the Supreme Court of the United States shall directly rule that Congress may not constitutionally make such conduct unlawful." No appeal was taken from the judgments entered on these agreements and no motion for revision or vacatur has ever been made.

Finally, bringing the case up to the present, in an affidavit filed in support of plaintiffs' May 26, 1978, order to show cause herein it is alleged upon information and belief (and no affidavit contradicting such allegations has since been filed herein) that on May 23, 1978, John F. Leyden, President of PATCO, "held a press conference in Washington, D.C. at which he stated that frequent refusals by three airlines—Northwest Airlines, Inc., Pan American World Airways, Inc. and Trans World Airlines, Inc., all of them plaintiffs in this action—to let air traffic controllers ride free in cockpits on overseas flights as observers of in-flight techniques might trigger a nationwide air traffic slowdown. Upon information and belief, Leyden stated that the controllers are 'angry', and 'fed-up' with these airlines, predicted a 'spontaneous' slowdown could hit 'today, tomorrow or anytime' and observed that the airlines 'can allow us a free seat, or spend some money burning fuel'."[4] Plaintiffs

[3] No individual air traffic controller did so and the Court accordingly entered a permanent injunction as to the individual defendants on October 20, 1972.

[4] As stated on the oral argument, this Court does not credit newspaper articles but this one would appear to have called for a vigorous denial if not true.



order to show cause was filed three days later and defendants' motion to vacate followed quickly on its heels.

As noted above, the parties have stipulated that if this Court determines that the September 9, 1970, permanent injunction against PATCO, entered pursuant to the aforesaid stipulation, was valid and effective in May and June of this year, "PATCO shall be deemed to have disobeyed the prohibitions of said injunction with respect to slowdowns by air traffic controllers on May 25 and 26, 1978, and June 6 and 7, 1978."

In making their motion to vacate, defendants rely primarily on *New York Telephone Company* v. *Communications Workers of America*, 445 F.2d 39 (2d Cir. 1971), claiming that this case supports their position with respect to the applicability of the aforesaid permanent injunction to the present slowdowns. PATCO says that the case is indistinguishable and that it stands for the proposition that an injunction issued in a particular controversy and designed to restrain conduct arising out of that controversy may not lawfully be used as a basis to hold persons in contempt as to a future matter of dispute substantially altered from the original matter which has since been resolved. In particular, PATCO claims that the 1970 dispute related to the understaffing of air traffic control facilities, and the resulting impact on controllers, whereas the present dispute involves the issue of "free rides" to Europe to obtain familiarity with in-flight procedures. Thus the two disputes are totally different and unrelated and, under the *Communications Workers* case, the injunction entered as to the former dispute does not and arguably cannot apply to the latter one.

Plaintiffs, on the other hand, say that the *Communications Workers* case is distinguishable both on the facts and the law from the instant context and does not prevent enforcement of this Court's September 9, 1970 permanent injunction.

In particular, as to the factual distinction between this case and the *Communications Workers* case which mandate

a different conclusion, plaintiff notes first that in the *Communications Workers* case the complaint and other relevant papers submitted on the original application for a temporary restraining order were clearly limited to the specific dispute involved therein, *see Communications Workers* at p. 47, whereas in the instant case the papers seeking the original restraining order and the papers involving the present contempt proceeding both were essentially predicated on alleged violations of the aforementioned federal statutes which make all strikes by government employees, regardless of purpose, illegal.

As a second significant factual distinction, plaintiffs note that the Second Circuit in the *Communications Workers* case was troubled by the absence of consideration or a "*quid pro quo*" for the broad and indefinite injunction to which the union had consented, *see Communications Workers* at p. 47-48, whereas here the plaintiffs waived their right to claim substantial money damages for the losses incurred during the alleged 1970 slowdown and to pursue their motion to have defendants adjudicated in contempt of the Court's March 30, 1970 temporary restraining order. Moreover, as plaintiffs point out, the entry of the permanent injunction on September 9, 1970 arguably yielded a collateral benefit to defendant PATCO in influencing the Assistant Secretary of Labor for Labor Management Relations to reinstate PATCO as a representative of federal employees, under Executive Order 11491, after having been disqualified as such a representative on August 12, 1970, due to the alleged 1970 slowdown. Therefore, it is not an exaggeration to say that PATCO may well have bargained for its very existence in consenting and entering into the permanent injunction in question and, in this regard, it is significant to note that the original August 24, 1970, draft of the final permanent injunction was prepared by the attorneys for PATCO and not the attorneys for the plaintiffs.

This Court finds these two basic factual distinctions to be valid and meritorious. Quite clearly absent from this case



is the ambiguity of intent and absence of substantial consideration to support the broadly framed permanent injunction which so troubled the Second Circuit in the *Communications Workers* case. In the case at bar, the intent of the parties to make the 1970 permanent injunctions applicable to all subsequent strikes, slowdowns, stoppages or job actions is unmistakably clear, as is the valuable consideration surrendered by the plaintiffs in entering the stipulation. These factual distinctions alone might support the conclusion that the 1970 permanent injunction does presently "apply to restrain the conduct alleged against PATCO",[5] but the Court finds additional support for this conclusion in the legal distinctions between the instant case and the *Communications Workers* case.

Specifically, underlying the Second Circuit's decision in *Communications Workers* was the concern that the injunction at issue was not only founded on arguably ambiguous intent and insufficient consideration, but it directly contravened the underlying policy of Section 9 of the Norris-LaGuardia Act and the Supreme Court's decision in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U.S. 235 (1970), on the use and limits of federal court injunctions in the context of labor-management disputes. Thus the Court questioned the enforcement of the consented to injunction in a situation in which, under the statute and case law cited above, the employer might not otherwise have been entitled to federal court intervention.

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[5] Indeed, Judge Mansfield, in his concurrence and dissent to the *Communications Workers* case, citing the "long line of cases holding that consent orders are to be interpreted and enforced as written even if they are overbroad." *Communications Workers,* at p. 54, noted that the permanent injunction in the case, even if otherwise vulnerable to attack under the Norris-LaGuardia Act, would be immune from such attack if entered upon the valid consent of the parties. *Id.* at p. 52. Thus the only question for the Court, Judge Mansfield concluded, was the intent of the parties as to the scope of the stipulated injunction. He favored a remand to the District Court for a hearing on this question.

In the instant context, however, this Court is faced with the statutes cited above which prohibit federal employees from engaging in any strike which would support the permanent injunction at issue in this case. Indeed, for this Court to enforce the permanent injunction in the present context would merely reinforce a prohibition already clearly made by the aforementioned federal statutes.[6]

In response to this conclusion, defendants argue, in essence, that the statutes in question and the instant injunction are not necessarily co-extensive in their coverage and that the latter might well cover activity arguably not in violation of the former.

Assuming *arguendo* that, if placed side by side a court might not in the abstract construe the statutes to be as broad as the injunctive language, such construction would have no relevance in this case because the parties in 1970 by their stipulation agreed that they were to be co-extensive and agreed that the injunction was to be based on the statutes. In the last analysis, this is the determinative fact in this case.

That the parties understood and intended the prohibitions of the federal statute in question to be the essential basis for the injunction in question is evident from the express provision that the injunction could be vacated if Congress repealed the statutes or if the Supreme Court declared them to be unconstitutional. Neither eventuality having occurred,

[6] In addition, the decision and order of the Assistant Secretary of Labor for Labor Management dated January 29, 1971 reinstating PATCO as a representative of air traffic controllers directed PATCO and its officers, agents and representatives to cease and desist from:

> "calling or engaging in *any strike, work stoppage or slowdown* against the Federal Aviation Administration or any other agency of the Government of the United States, or *from assisting or participating in any such strike, or slowdown.*" (Emphasis added.)



this Court concludes that the injunction does presently "apply to restrain the conduct alleged against PATCO."

In summary then, this Court is convinced that the parties, in negotiating and executing the stipulation upon which the permanent injunction was entered on September 9, 1970, intended the same to be fully applicable to all future violations thereof by PATCO, that adequate consideration supported this stipulation and injunction, and that enforcement of it by this Court at this time is further supported by the statutory prohibitions of strikes by federal governmental employees. Accordingly, said injunction is still in full force and effect, and, in accordance with the stipulation between the parties, dated June 22, 1978, this Court deems PATCO to have disobeyed this injunction on May 25 and 26, 1978, and June 6 and 7, 1978, and orders PATCO to pay the plaintiff Air Transport Association of America the sum of $100,000, i.e., $25,000 for each daily violation of the 1970 injunction, as provided for in that injunction.

That normally would end the matter and it does except for some observations that this Court feels constrained to make in light of all of the facts and circumstances of this case. As Judge Judd said in the first of his opinions,[7] the federal statutes involved, 5 U.S.C. § 7311 and 18 U.S.C. § 1918, are "laws of the United States which it is my sworn duty to uphold". They are also laws which it is equally my sworn duty to uphold.[8] But more importantly, defendants, too, when they assumed their jobs as federal employees swore to adhere to them.

In this regard, on the oral argument on June 23, 1978, in this matter, counsel for PATCO, in response to questions from this Court with respect to the conduct of PATCO and

[7] *Air Transport Association* v. *Professional Air Traffic Controllers Organization, supra,* 313 F.Supp. at 183.

[8] It is also the sworn duty of the Attorney General to enforce these laws but for reasons not fathomable by this Court they have apparently yet to initiate any investigative or enforcement proceedings.

the air traffic controllers pending the decision of this Court, or any appeals therefrom, represented that "What you have by way of the stipulation by way of our presence here, and by way of the representations is that PATCO and the plaintiffs [sic the defendants] are going to comply with the law. Now, whether you believe that that's enough I don't think is so much a reflection on whether you believe me or the defendants but maybe is simply a reflection on the incapacities of the law itself." The Court accepted that representation as a representation that PATCO and the defendants were going to comply with the law which, as this Court has now held, prohibits the activity of which the plaintiffs have complained herein.

In connection with this promise to obey the law, the Court would like to gently remind the defendants that they are in no different position than any other employee of our federal government, including each and every federal judge in this country. All of us also are under the same strictures of the above-cited federal statutes and have taken identical oaths not to violate the same or to participate in any strike against the government. Were these laws and oaths not to be honored and upheld, anarchy and chaos would inevitably result.

Again as Judge Judd said in his opinion [9] (and this is particularly true in the case of the defendants), "One of the reasons for the federal statute against strikes by federal employees is that the employees are performing an essential service, for the benefit of the public, and also for the segment of the public which the particular employees serve." In addition to the essential public services which the defendants provide, they are, I am sure, mindful of the fact that they have the lives of many thousands of people in their hands on each and every one of their working days. The Court does not even wish to entertain the notion at this time that one would wilfully trifle with such awesome responsibility in such a way as might possibly jeopardize the lives

[9] *Air Transport Association* v. *Professional Air Traffic Controllers Organization, supra,* 313 F.Supp. at 183.



of one or more members of the innocent traveling public. Moreover, I am sure I need not remind the defendants that it is not solely the "airlines fuel" that is being burned, but precious fuel needed not only for our national defense but for the very health and livelihood of millions of their fellow countrymen.

Stated in another way, government employment is a privilege which carries with it in many cases, including this, awesome responsibilities. If one undertakes such responsibilities, one has a sworn obligation to fulfill them. If defendants are dissatisfied with the conditions of this undertaking, the solution, failing negotiations or persuasion, is to seek other employment, not to engage in or encourage conduct which violates the law and their sworn oaths at the expense of and possible endangerment to the lives of innocent people and the nation as a whole.

SO ORDERED; settle judgment on notice.

Thomas C. Platt
U.S.D.J.

# APPENDIX C

## 29 U.S.C. §§ 101-110

### § 101. Issuance of restraining orders and injunctions; limitation; public policy

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

### § 102. Public policy in labor matters declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.



### § 103. Nonenforceability of undertakings in conflict with public policy; "yellow dog" contracts

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

> Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby
>
> (a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or
>
> (b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

### § 104. Enumeration of specific acts not subject to restraining orders of injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regard-

less of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

### § 105. Doing in concert of certain acts as constituting unlawful combination or conspiracy subjecting person to injunctive remedies

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

### § 106. Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.



### § 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice

thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.



### § 108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

### § 109. Granting of restraining order or injunction as dependent on previous findings of fact; limitation on prohibitions included in restraining orders and injunctions

No restraining order or temporary permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter.

### § 110. Review by Court of Appeals of issuance or denial of temporary injunctions; record; precedence

Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the court of appeals for its review. Upon the filing of such record in the court of

appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

## APPENDIX D

Department of Justice
Washington 20530
Sep 22 1978

Honorable Langhorne Bond
Administrator
Federal Aviation Administration
Washington, D.C.

Dear Mr. Bond:

The Federal Aviation Administration (FAA) has furnished information to the Department of Justice pursuant to an agreement with Thomas C. Platt, Judge, United States District Court for the Eastern District of New York during the pendency of *ATA* v. *PATCO,* Civil No. 70 Civ. 400. Review of this information demonstrates an air traffic slowdown occurred on May 25-26 and June 6-7, 1978, as a part of a concerted job action. This job action was apparently conducted by approximately 30 air traffic controllers. The cause of the job action is reported to have been discontent over the decision of certain air carriers not to grant the controllers overseas familiarization trips in the cockpit.

While the information presented by the FAA indicates that sufficient evidence may exist to support criminal prosecution under the anti-strike statute, 18 U.S.C. 1918, at this time, we have decided to decline criminal prosecution of the individuals involved as well as certain Professional Air Traffic Controllers Organization (PATCO) union officials. Among the considerations which provided the basis for this decision was the long-standing policy of this Department not to preliminarily initiate criminal prosecution under the



anti-strike statute, 18 U.S.C. 1918. Generally, any attempt to impose criminal penalties may be less than satisfactory if the alternative of instituting criminal action should be suddenly introduced into a labor dispute situation. This observation is particularly applicable to 18 U.S.C. 1918 since in that statute's twenty-three year history we have never brought a criminal prosecution in response to strikes by government employees. Therefore any contemplated departure from this policy of the Department relating to prosecution under the anti-strike statute should be preceded by notice being communicated to any individuals upon whom such a departure from our policy may impact at some possible future date.

You may be assured that the Department of Justice is acutely aware of the serious impact that a deliberate air traffic slowdown can have on civil aviation safety, as well as the inconvenience to members of the traveling public which can result from such a slowdown.

Having reviewed our policy with respect to initiating criminal prosecution for violation of the anti-strike statute, it is the position of this Department that an air traffic slowdown as a part of concerted job action may provide sufficient basis to support initiation of criminal proceedings for a violation of the anti-strike statute, 18 U.S.C. 1918. However, prior to resorting to criminal proceedings certain possible alternative steps must be thoroughly considered and, where feasible, implemented. These steps are as follows: (a) This Department will seek appropriate injunctive relief against the union and the individuals involved, provided that an air traffic slowdown as part of a concerted job action or other strike activity is in progress; (b) in the event that the air traffic slowdown or the strike activity should continue, the necessary action will be taken to have any union members and/or union officials held in civil contempt and we would seek fines against both the union and the individual members involved of amounts up to $25,000 a day; and (c) the FAA will initiate administrative action against the union,

its membership, and/or individual employees. If any or all of these are determined to be ineffective, criminal investigations with a view towards prosecution will be undertaken either independently of or in conjunction with such civil and administrative action.

In view of these observations concerning our policy which could result in the invoking of criminal sanctions, we suggest that the organizations and individuals affected by this policy should be so advised.

Sincerely,

Philip B. Heymann
Assistant Attorney General
Criminal Division